

***United States Court of Appeals
for the Second Circuit***



EXHIBITS

76-1373

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 76-1373

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

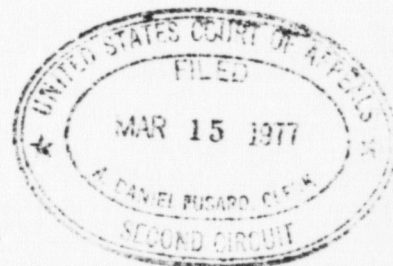
- against -

FRANK SACCO, BENJAMIN GENTILE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

Exhibit
SUPPLEMENTAL APPENDIX OF THE
DEFENDANT-APPELLANT FRANK SACCO



DAVID BLACKSTONE
401 BROADWAY
NEW YORK, N. Y. 10013
TEL. 226-6684

ATTORNEY FOR DEFENDANT-APPELLANT
FRANK SACCO

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 76-1373

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

FRANK SACCO, BENJAMIN GENTILE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

EXHIBIT VOLUME TO JOINT APPENDIX
OF DEFENDANTS-APPELLANTS FRANK
SACCO AND BENJAMIN GENTILE

DAVID BLACKSTONE
401 BROADWAY
NEW YORK, N. Y. 10013
TEL. 226-6684

ATTORNEY FOR DEFENDANT-APPELLANT
FRANK SACCO

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EXHIBIT A

United States District Court
Southern District of New York

United States District Court }
VS. } NO 72-
Frank Sacco } CR 332
Defendant } JUDGE GAGLIARDI

Office of the Clerk:

Dear Sir:

I am in receipt of your letter dated Aug 2nd 1972 and the return of the supplement motion for discovery and inspection of which I am re-submitting to the Court.

Please advise the Court that I did not ask for the Court appointed attorney that was assigned to me and that I do not want him and intend to proceed pro-se and represent myself.

Please submit this letter to the Court

(2)

and I want it treated
as a motion. If necessary,
please arrange to have me
brought to Court to
resolve the issue of counsel.
I have submitted
many motions pro-se and
have not received any
answers from the U.S. Attorney.
This enclosed motion
is very important and I
do not want it returned
until the Court decides
the issue of counsel.

Dated

Aug 3, 1972

Thank you
Frank Sacco
427 West Street
New York, N.Y.

EXHIBIT B

(B)

In The
United States District Court
Southern District Of New York

United States Of America
v.
Frank Sacco, et al
Defendant

CR. NO 72-CR,332

Motion For An Evidentiary Hearing
For Disclosure Of Wiretaps -

Defendant Frank Sacco, moves this Court for an evidentiary hearing to be held in order that testimony be given to determine if oral communications that were intercepted and recorded by State authorities provided the leads which caused this indictment.

Defendant further moves the Court to make an independent inquiry as to whether there has been an unreasonable search

and seizure by State officers,
whether or not there has
been such an inquiry by
a State Court, and irr-
espective of how any such
inquiry may have turned
out.

Elkins v. United
States 364 U.S. 206 4 L. Ed.
2d 1669, 80 S.Ct. 1437 (1960).

Defendant is prepared
to swear under oath to
this Court that he has been
informed by certain persons
that the wiretaps obtained
by the State authorities
provided the leads to his
indictment now before the
Court.

Respectfully submitted

9-5-72

Frank Sacco
427 West Street
New York, N.Y.

EXHIBIT C

(C)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA

v

72-CR 332

FRANK SACCO,
Defendant

NOTION FOR APPOINTMENT OF CONSERVATOR

The defendant, Frank Sacco, having previously moved the Court for appointment of an expert in electronic sound detention and an Order prohibiting the New York State Authorities from editing illegal wiretaps obtained by them from defendants premises now moves the Court for an Order for appointment of a conservator in order that the electronic tape recordings of defendant now in the custody and control of the New York State Authorities will not be edited or destroyed.

Defendant brings the Court's attention to Title #18, U. S. C. Section 2518 (8) which prohibits any editing, alteration or destruction of intercepted taped communications .

It is defendants belief that because of the complexity of his outstanding litigation in the Federal Courts and State Court which involve the illegal wiretaps in the custody and control of the New York State Authorities, that the New York Authorities will destroy such tapes or edit them in such a manner that they cannot be used to show that the leads came from them which caused defendants indictment and conviction.

Defendant respectfully requests oral argument on this motion and prays that he be brought to Court forthwith in order that argument can be presented and an Order be issued for the herein relief and for such other and further relief as the Court may deem proper and just.

Dated April 28, 1973

Respectfully submitted,

Frank Sacco

Frank Sacco, defendant pro se
427 West Street
New York, N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT COURT

UNITED STATES OF AMERICA

v

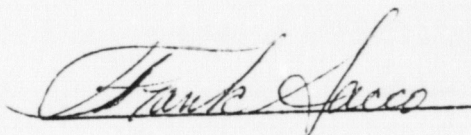
72- CR 332

FRANK SACCO,
Defendant

CERTIFICATE OF SERVICE

The defendant, Frank Sacco, hereby CERTIFIES that he mailed the original of the attached motion to the United States District Court for the Southern District of New York and a true copy to the United States Attorney, Southern District of New York, Foley Square, N.Y. on the date indicated below.

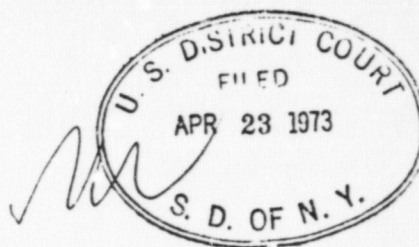
Dated April 28. 1973



Frank Sacco, defendant, pro-se
427 West Street
New York, N.Y.

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA

v

CR NO 72 -332

FRANK SACCO,
Defendant

MOTION FOR APPOINTMENT OF AN EXPERT IN ELECTRONIC SOUND DETECTION

Comes now the defendant, Frank Sacco, and respectfully moves the Court for an Order permitting defendant to employ an expert in the field of electronic sound detection, transmission and recording in order that such expert may listen to the electronic tape recordings obtained by the Westchester County District Attorney of which are being turned over to defendant as per the United States District Court's Order in the District Court of Maryland.

The main purpose of the expert listening to these tapes is to find out if there were any erasures, splicing, or other tampering with the tapes. Defendant is told that there is an instrument employed by expert practitioners in the field of electronic sound detection known as the electronic oscilloscope, which when used in auditing electronic tape recordings, can detect electrical or magnetic impulses on the tapes which are not visible to the eye of a person visually examining the tapes or to the unaided ear of the listener. The oscilloscope can reveal signals which cannot be detected by any other means.

Upon information and belief of which defendant at this time cannot reveal to the Court, it is his understanding that the Westchester County tapes have been tampered with and altered.

For the reasons stated herein above, defendant respectfully requests of the Court to grant this motion and for such other and further relief as the Court may deem proper and just.

Dated April 18, 1973

Respectfully submitted

A handwritten signature of Frank Sacco, written in dark ink, positioned above the typed name and address.

Frank Sacco, defendant, pro-se
427 West Street
New York N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v

CR NO 73-332

FRANK SACCO,
Defendant

MOTION FOR AN ORDER PROHIBITING NEW YORK STATE AUTHORITIES FROM EDITING
WIRETAPS OF DEFENDANT WITHOUT FEDERAL SUPERVISION

The defendant, Frank Sacco, respectfully moves this Court for an Order prohibiting the New York State Authorities from editing the wiretapped conversations of defendant without supervision by federal authorities.

Defendant has been advised by his court appointed attorney in Baltimore Md., that at a conference held on April 17, 1973, before the Honorable Judge Kaufman, in the United States Court House, that the tapes in the possession of the New York Authorities which were ordered turned over to defendant were to be edited in order that defendants conversations could be given to him.

Defendant by separate motion is making a request of the Court to have an expert witness examine the New York tapes to determine if they have been altered with and edited. For the reasons stated in that motion, defendant respectfully requests that this motion be granted forthwith and for such other and further relief as the Court may deem proper and just.

Respectfully submitted

Dated April 18, 1973

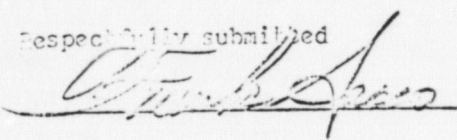

Frank Sacco
127 West Street
New York, New York

EXHIBIT I

(e)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA :

V. :

CRIMINAL NO. 71-0371-K

FRANK JACCO :

MEMORANDUM AND ORDER

After review of all documents filed by the Government and by the defendant in this case, this Court does not believe that any further hearing is required at this time. As set forth in earlier documents filed in this case, this Court is not in agreement with the Government's position that the defendant should not be provided with the overheard conversations to which he was a party. On the other hand, this Court is of the opinion that the defendant has had ample opportunity to demonstrate in this Court, and perhaps in other Courts, his interest in premises in which there was installed a telephone used in a conversation which was the subject of wiretapping surveillance by the Worcester County authorities, and that the defendant has failed to submit to this Court any documentary or oral evidence establishing his interest in any such premises. In rejecting the Government's position that this Court end the post-trial taint hearing in this case and not require the Government to provide the defendant with any of the tapes, or transcripts thereof, of overheard telephone conversations to which the defendant was a party, this Court takes into account that once that question was first raised by the defendant during trial, this Court and counsel on both sides proceeded on the assumption that the defendant would be given the right to inspect such tapes or transcripts during the post-trial period, unless the constitutionality of the surveillance was determined by this Court or a

Court having jurisdiction in the premises. To and including this date, the Government has asked this Court to consider, elsewhere only, that such surveillance was unconstitutional. Accordingly, this Court rejects the current position urged upon it by the Government as inconsistent with the position which the Government, until recently, had taken, namely, the position that the defendant would be given the opportunity to inspect such tapes or transcripts. In taking that position, this Court is in agreement with the Government with regard to the degree of discretionary authority open to this Court. For the reasons indicated above, this Court is exercising that authority so as not to require the production for inspection of any tapes or transcripts of telephone conversations to which the defendant was not a party, but rejects the Government's urging that this Court should exercise such discretionary authority to deny the defendant the right to inspect the tapes or transcripts of telephone conversations to which he was a party.

This Court also notes the statement in a letter dated June 15, 1973 from Messrs. Kramer and Linton that the cost of providing the taped conversations will be borne by the Administrative Office of the United States Courts under the Criminal Justice Act. Insofar as this Court is concerned, it is the duty of the United States Government, in its role as prosecutor, as required by the Supreme Court's decisions in Elkins and Alderman, to provide the tapes and/or transcripts for inspection. It is, therefore, up to the United States, in its role as prosecutor, to make the necessary arrangements for payment of such costs. If the United States, in its role as prosecutor, can make arrangements for the cost of such provision to be borne by the Administrative

Office, this Court has no objection. However, this Court rejects the theory which would seem to be implicit in the Government's position as prosecutor that it is up to the defendant to bear the costs of the aforesaid provision and therefore if the defendant is indigent up to the Court to arrange for the payment of the same through the Administrative Office.

The Government, in its role as prosecutor, has had ample time to make arrangements along the lines which this Court has previously ordered and hereby again orders. In that connection, this Court notes the references in the aforesaid June 15, 1973 letter concerning information which was previously furnished to this Court. However, Messrs. Kramer and Linton failed to state in their said letter that, as the file in this case makes completely clear, this Court has ordered the Government, in its role as prosecutor, to take such steps as are necessary to furnish the tapes or transcripts of the intercepted conversations to which the defendant was a party. It is this Court's understanding that the Westchester County authorities will cooperate with the United States Government as prosecutor in order to make it possible for that order to be complied with by the United States Government in its role as prosecutor provided the United States Government in said role bears the burden of the cost of the same. This Court hereby reconfirms, as stated in this document, its said order and hereby requires the United States Government, in its role as prosecutor, to inform this Court, no later than June 25, 1973, that arrangements have been made for the provision of the tapes and transcripts to the extent set forth above and for the unsealing

and delivering of the tapes to be conducted in a manner satisfactory to the Westchester County authorities and counsel on both sides in this case and in the pending federal criminal cases involving the defendant in the United States District Court for the Southern District of New York and in the United States District Court for the Middle District of Florida. If arrangements for such processing cannot be arrived at satisfactorily among counsel, this Court suggests that such questions be referred to the Honorable Leo P. Gagliardi, United States District Judge for the Southern District of New York, to whom the federal criminal case involving the defendant in that Court has been assigned.

It is this Court's understanding that the defendant is seeking, in the above-mentioned two other Federal District Courts and in this Federal District Court, all of the tapes or transcripts of the Westchester County telephone surveillance on the ground that such surveillance was directed principally against him. If, pursuant to the order of this Court, the defendant is provided with tapes or transcripts of all such telephone conversations to which he was a party, his quest for those tapes or transcripts in all three court proceedings will seemingly have been satisfied. In addition, insofar as the proceedings in this Court are concerned, the defendant has already been provided with transcripts of the surveilled communications to the extent those communications refer to Hagerstown, Maryland or Elmer Bull. That latter provision would not seem to be relevant or material in connection with the proceedings pending in the other two federal district courts.

To recapitulate, after a full review of the contentions set forth by the United States Government in its role as prosecutor, and by the defendant, this Court, in this case, hereby orders the United States Government, without delay, and no later than June 25, 1973, to inform this Court that the tapes or transcripts of the above referred to telephone conversations to which the defendant was a party will be provided to the defendant and the detailed arrangements which will be made in connection with such provision.

The Clerk is directed to send copies of this Memorandum and Order to Paul R. Kramer, Esq., and Leonard H. Linton, Jr., Esq., Assistant United States Attorneys, to John D. Hackett, Esq., counsel for the defendant, and to the defendant. The Clerk is also directed to send copies to the Honorable Noel P. Fox, Chief Judge, of the United States District Court for the Western District of Michigan, Grand Rapids, Michigan 49502, and to the Honorable Leo P. Cogliardi, United States District Court, New York, New York 10007.

It is so ORDERED, this 19th day of June, 1973.

Fred A. Altmann

United States District Judge

EXHIBIT F

(F)
November 30, 1973

Mr. Frank Sacco
#95551
P. O. Box P.H.B.
Atlanta, Georgia 30315

Dear Mr. Sacco:

Re: United States v. Frank Sacco
Criminal No. 71-0371-X

I have your letter dated November 25, 1973, received in this Court on November 29, 1973. While I understand your preference for New York, I believe that it is best under the circumstances for the tapes to be sent to you in Atlanta as set forth in my letter of November 19, 1973. I ask you to let me know whether, in connection with the post-trial taint hearing in this case, on an unqualified, unconditional basis, you desire to waive counsel.

With regard to the third unnumbered paragraph on the second page of your said November 25, 1973 letter, I ask Government counsel to respond thereto on or before December 10, 1973.

Insofar as the fourth unnumbered paragraph on page 2 of your said November 25, 1973 letter is concerned, I again inform you that if you desire to question the representation of the Westchester County authorities that all tapes of telephone conversations to which you were a party will be supplied to you with any taping or deletions in connection with the same, you have the opportunity to raise that issue in your case pending before Judge Gayliardi.

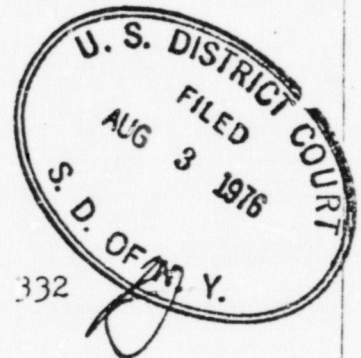
Very truly yours,

Frank A. Kaufman

cc: Honorable Noel P. Fox
Honorable Lee P. Gayliardi
Warden James Henderson, U.S. Penitentiary, Atlanta, Georgia
Eugene M. Barkin, Esq., General Counsel, U.S. Bureau of Prisons
Washington, D.C.
Paul R. Kramer, Esq.
Leonard M. Linton, Jr., Esq.
Official Court File

EXHIBIT G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
UNITED STATES OF AMERICA

v

72 - CR - 332

FRANK SACCO, et al,

Defendant
-----X

MOTION TO DISMISS CONVICTION FOR
LACK OF A FAST AND SPEEDY POST-
TRIAL "TAINT" HEARING.

The defendant, Frank Sacco, upon all the proceedings had herein, upon his annexed affidavit and memorandum in support hereof, respectfully moves the Court pursuant to the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, and his Constitutional rights under the Sixth Amendment, for an Order dismissing the conviction and indictment found against him upon the grounds that he has been denied a fast and speedy post-trial "taint" hearing which violated the requirements of fundamental fairness assured by the due process of law that he is entitled to.

W H E R E F O R E, it is respectfully requested that this motion be granted in all respects and for such other and further relief that the Court may deem just and proper.

March 15, 1975

Respectfully submitted,

Frank Sacco

74
Frank Sacco, defendant, pro se
427 West Street
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA

v

72 - CR - 332

FRANK SACCO, et al,

Defendant
-----X

A F F I D A V I T
IN SUPPORT OF ATTACHED MOTION
TO DISMISS CONVICTION FOR LACK
OF A FAST AND SPEEDY POST-TRIAL
"TAINT HEARING"

COUNTY OF NEW YORK)
STATE OF NEW YORK) ss

F R A N K S A C C O, being duly sworn,
deposes and says:

1. That he is the defendant herein and makes this affidavit in support of his motion to dismiss the conviction and indictment for the delay of the government to afford him a fast and speedy post-trial "taint" hearing as guaranteed to him under the Sixth Amendment to the Constitution of the United States.

2. Defendant avers that he was not responsible for the delay or conclusion of the post-trial "taint" hearing and the record is clear that the government was and still is responsible for such delay in that they did not move with

due diligence to obtain the illegal wiretaps from the New York State Authorities to turn over to him as per the Supreme Court holding of ALDERMAN UNITED STATES, 394 U.S. 165, and the Court Order of Honorable Frank A. Kaufman issued out of the United States District Court for the District of Maryland.

3. That since defendants indictment and conviction in the instant matter, 6 witnesses that defendant would have subpoenaed have died, one of which was prior to the indictment and conviction and five thereafter. The names of the witnesses and what they would have testified to is as follows:

(a) ALFRED J. DEISO;

Mr Deiso was an attorney in Yonkers, New York, who represented the defendant in various business matters and whose conversations were recorded over the various phones that were intercepted by the Westchester Authorities. Mr Deiso would have testified that he was questioned by Agents of the F.B.I., namely William Walsh about defendants transactions with James E. Brown from Orlando, Florida; Elmer Hull from Hagerstown Maryland, Sonny Robbins, the alleged victim in the instant matter, Kathryn Fabian and Dooleys Bar in Peekskill, New York; Carl Miller and Mayor Kenny Wells from Opa Locka Florida; and various other persons and matters contained in the intercepted conversations. Mr Deiso's testimony would have revealed that he was questioned about the hereinabove referred to persons prior to May 5, 1970.

(b) George Simrany;

Mr Simrany's affidavit is attached hereto and marked EXHIBIT "A". Mr Simrany would have expanded more on paragraph 5 , 6, and 7 of his affidavit and would have testified to other matters that he was questioned about by F.B.I. Agent Walsh that could have only come from the Westchester wiretaps. Indeed, the wiretapes reveal conversations that will corroborate paragraphs 5, 6 and 7 of Mr Simrany's affidavit.

(c) Bartholomew Ruggerio;

Mr Ruggerio would have testified that he was interviewed by F.B.I. Agent Walsh prior to May 5, 1970, and that he was specifically questioned about a robbery committed upon him by unknown persons that Agent Walsh was trying to associate with defendant. He would have also testified that Mr Walsh inquired of him if he cashed any money orders or checks for defendant that came from Maryland and Orlando Florida. Mr Ruggerio would have verified that he mailed a document to defendant that fell out of Agent Walsh's folder when he was questioned by him such document having been obtained in a search and seizure by the District Attorney's office of Westchester County. (this document is available for an in-camera inspection only) It should be pointed out that the document in question was not found by Mr Ruggerio until after the search and seizure of defendants home and offices by the District Attorney of Westchester County and a subsequent visit and interview by Agent Walsh of the F.B.I.

(d) Louis Fratus:

Mr Fratus would have testified that he was approached and questioned by Agents of the F.B.I. from the Miami and Tampa Florida office's; and Agents from the New York office. He would have also testified that the Agents showed him logs that contained conversations between Carl Miller, Kenny Wells and defendant and he would have further testified he was questioned about a trip he took to Maryland, a car he rented and what involvement he had with Elmer Hull.

(e) Arthur Sacco:

Mr Sacco would have testified that he was questioned by the Agents of the F.B.I. in Miami Florida about James E. Brown, Elmer Hull, Sonny Robbins and many other matters that could have only come from the wiretaps.

(f) Bill Marlo:

Mr Marlo would have testified that he was questioned by F.B.I. Agents about defendant concerning quite a few transactions that defendant had with various persons, such transactions having been discussed over the telephones which were intercepted by the Westchester Authorities.

Sworn to before me this

20th day of March, 1975

Anthony J. DeLoe
F.D.A. 27

Frank Sacco
Frank Sacco, defendant, pro se
427 West Street
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA

v

72 - CR - 332

FRANK SACCO, et al,

Defendant

----- X

MEMORANDUM IN SUPPORT OF MOTION TO
DISMISS INDICTMENT FOR LACK OF A
FAST AND SPEEDY POST-TRIAL TAINT
HEARING

The defendant, Frank Sacco, most respectfully submits this memorandum in support of his motion to dismiss the indictment in the above captioned cause for lack of a fast and speedy post-trial "taint" hearing and for reasons thereof shows the Court the following:

(a) That sometime in March, 1972, defendant and co-defendants Gentile and Rhines were indicted in the instant matter;

(b) That on September 11, 1972, defendant commenced trial but not after having raised the issue of illegal wiretapping and the government making the representation to the Court that none existed;

(c) Shortly thereafter, this Court granted defendant a post-trial "taint" hearing and after many legal entanglements, the Westchester Authorities were ordered by the United States District Court for the District of Maryland to turn over to defendant the illegally obtained intercepted conversations. The tapes were turned over to defendant in January 1974 and it took defendant an additional 8 months to listen to them.

While it may be argued by the government that defendant was afforded a speedy trial within his constitutional rights, they cannot argue that the post-trial "taint" hearing is not an integral part of the trial which still affords him the protection of the Sixth Amendment to the Constitution of the United States. ie., fast and speedy trial.

The defendants alleged guilt in the instant matter has no bearing on the instant issue and once it has been established that he has been denied a fast and speedy disposition on the issue of "taint", the only possible remedy is dismissal. The facts in the instant matter show that the government has not exercised due diligence in completing the post-trial "taint" hearing. The speedy trial trial guarantee recognizes that a prolonged delay may subject the accused to emotional stress that can be presumed to result in an ordinary person, from uncertainties and the prospect of facing public trial or receiving a sentence longer than, or consecutive to the one he is presently serving. STURNK v UNITED STATES, 93 S.C. 2260 (1973)

The right to a speedy trial is not a theoretical or abstract right, but one rooted in hard reality on the need to have charges promptly exposed. If the case which the prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecution's case, as it is the defendant's right, the time to meet them is when the case is fresh. Stale claims have never been favored by the law, and far less so in criminal cases. The right to a prompt inquiry into criminal charges is fundamental, and the duty of the charging authority is to provide a prompt trial. This is brought sharply into focus, when as in the instant matter, the defendant is pressed for an early confrontation with his accusers and the government. Crowded dockets, the lack of judges and lawyers, and other factors, no doubt, make some delays inevitable. Here, however, no valid reason for this delay exists. It is exclusively for the convenience of the government. On the record, the delay, with its consequent prejudices, is intolerable, as a matter of fact, and impermissible as a matter of law.

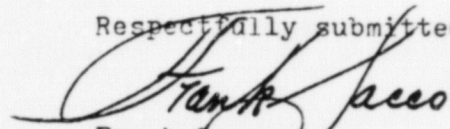
In BARKER v. WINCO, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed 2d 101 (1972), the Court stressed the balancing test to determine if the defendant was deprived of a fast and speedy trial. Of these the most serious was the prejudice to the defendant. In the instant matter, the defendant can demonstrate that the Government's delay has caused him substantial prejudice, in that, six witnesses have died as more fully described

in his attached affidavit. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can't really be shown. W

WHEREFORE, for the foregoing reasons and oral argument that defendant proposes to give in support of his motion to dismiss the indictment for the failure of the Government to afford him a fast and speedy post trial taint hearing, it is respectfully requested that after such argument, the the motion be granted in all respects.

March 20, 1975

Respectfully submitted,

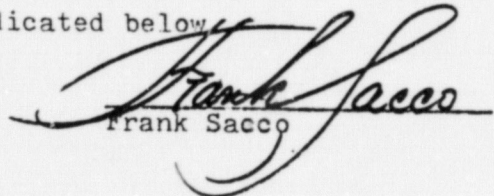


Frank Sacco,
Defendant pro se
427 West Street
New York, N.Y.

CERTIFICATE OF SERVICE

The defendant, Frank Sacco, hereby CERTIFIES that he mailed the original of the attached motion and herein memorandum to the Honorable Lee P. Gagliardi, United States District Court, Southern District of New York, Foley Square, New York, N.Y., and a true copy to Michael C. Eberhardt, Special Attorney for the United States Department of Justice, 26 Federal Plaza, New York, N.Y., on the date indicated below.

March 20, 1975



Frank Sacco

A F F I D A V I T

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss

George Simrany, being duly sworn deposes
and says:

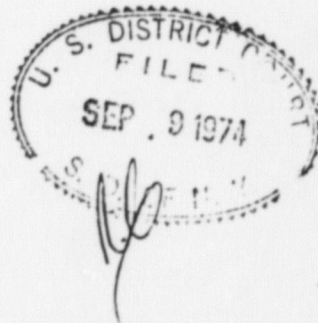
1. That I reside at 63 Palisade Ave, Yonkers, New York, and I am making this affidavit freely and voluntarily.
2. That I have not been threatened or coerced in any manner or any way to make or give this affidavit.
3. That I have not been offered any monetary consideration and this affidavit will be the truth to the best of my recollection at the present time.
3. That sometime in the early part of 1970, I was approached by F.B.I. Agent William Walsh and several other Agents and questioned about an outstanding criminal matter pending in the Southern District of New York.
4. At the time that Agent Walsh questioned me, I was recovering from a slight heart attack and he offered to take me to New York in an ambulance in order that I may give testimony in the outstanding case. I declined the offer and the criminal matter was latter dismissed.
5. A short time latter in the early part of 1970, Agent Walsh came to interview me again and this time he came alone. Mr Walsh questioned me about loan transactions that I had with Frank Sacco which I denied and he assured me that he had proof that I had certain transactions with Mr Sacco.
6. Mr Walsh told me that he knew that Frank Sacco had me call a person named Mr Halpern in order to obtain a second mortgage on my home to pay Mr Sacco the money that I owed him. He also told me that he knew that Mr Sacco wanted me to buy a new car either from DeFec Cadillac or Larson Ford, finance it, sell it and pay the proceeds to Mr Sacco.
7. Mr Walsh asked me about Benny Gentile and told me that he knew Mr Gentile was picking up money from me that was owed to Mr Sacco. He also asked me about televisions and meat that I had offered to Mr Sacco and wanted to know if the T.V. and meat was for repayment of the loan. Mr Walsh asked me if Mr Sacco ever came into my store with a gun and he also asked me a lot of other questions.

Sworn to before me this
_____ day of November 1974

George Simrany

EXHIBIT H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
UNITED STATES OF AMERICA :

V. :

FRANK SACCO, :

72-CR-332

Defendant :
-----X

NOTICE OF MOTIONS

AND

MOTIONS

1. For a new trial
2. For the designation of a new Judge to replace Judge Gagliardi
3. For the relief of Abraham Solomon as court appointed advisory counsel.
4. For fixing of a nominal bail
5. For a Writ of Habeas Corpus ad prosequendum

SIRS:

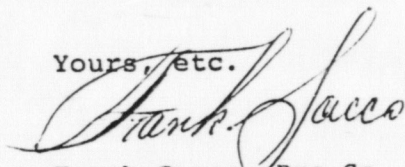
PLEASE TAKE NOTICE that upon the annexed motions, Frank Sacco, the above named defendant, acting pro se will move this Court before the Chief Judge thereof, Hon. David Edelstein, at the United States Court House Foley Square, New York, New York at such room number and at such time as the said Chief Judge shall fix for the following:

1. A new trial
2. The designation of a new Judge to replace Hon. Judge Gagliardi as the Trial Judge in the above proceedings
3. The relief of Abraham Solomon as court appointed advisory counsel
4. The fixing of a nominal bail

38

5. A Writ of Habeas Corpus ad Prosequendum for the appearance of the undersigned at the time and place for the hearing of the above Motions
6. Such other and further relief as to the Court may seem just and proper.

Yours, etc.



Frank Sacco, Pro Se
c/o William W. Carrier
Attorney at Law
Suite 1309 - 501 St. Paul
Place
Baltimore, Maryland 21202

TO: Paul Curran, Esq.
The United States Attorney
Southern District of New York
United States Court House
New York, New York 10007

1. Motion for a New Trial

Hon. Judge Gagliardi commenced the trial of this case before a jury after denying a pre-trial motion for suppression of certain material in the form of telephone taps, electronic surveillance, etc. the constitutionality of which was challenged.

At the conclusion of the jury portion of the trial, Mr. Sacco was not sentenced and as a result of certain Motions made with the Circuit Court of Appeals for the Second Circuit, Hon. Judge Gagliardi postponed any sentencing until after a post verdict hearing on the constitutionality of the surveillance, the question of taint and other related questions.

The law is as set forth by the Second Circuit Court of Appeals that such Motions to suppress must be heard prior to trial. United States v. Birrell, 470 F.2d 113 (1972).

In this case the Trial Judge has completely violated this rule of law and it is obviously a waste of time and unfair to the defendant to continue any further this illegal and unconstitutional procedure.

Approximately two years have elapsed since the jury verdict and the Trial Judge's ruling to hold a post verdict "taint" hearing.

The defendant has at all times protested such procedure so there has been no waiver of his rights.

Frank Sacco

3. Mr. Abraham Solomon should be relieved in view of his completely ineffective assistance as counsel and in any event the defendant and he are incompatible.

Frank Sacco

4. A minimum bail should be fixed.

In view of the fact that the defendant has not been convicted, he must be given bail and the bail in view of the papers already in this Court proceeding should be nominal. See United States v. Birrell, (CCA 2) September 10, 1968, where in an identical situation the Second Circuit so ruled.

Frank Sacco

5. In view of the defendant's peculiar knowledge of the facts, he is entitled to be present in this Court to argue these Motions and a Habeas Corpus for his appearance should issue for that purpose. He is presently incarcerated at the Baltimore County jail in Federal Custody.

Frank Sacco

EXHIBIT I

Allen
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

Aid
NOV 27 1974

FPI-MI-4-B-74-30M-2001

I

GAP OR TAMPERING

TAPE 5 DATE 10/20/69 START 105 STOP ***** CONVERSATION CUT OFF
TAPE 5 DATE 10/20/69 START 303 STOP ***** BLANK
TAPE 6 DATE 10/22/69 START 562 STOP 584 TAPE RUNS OUT
TAPE 20 DATE 11/13/69 START 000 STOP 061 UNINTELLIGABLE
TAPE 20 DATE 11/03/69 START 065 STOP 083 DISCONNECTED
TAPE 21 DATE 11/14/69 START 028 STOP 036 NUMBER STOP WORKING
TAPE 24 DATE 11/18/69 START 283 STOP 307 UNINTELLIGABLE
TAPE 24 DATE 11/18/69 START 508 STOP ** UNINTELLIGABLE VOICE IN
BACKGROUND F.S.
TAPE 26 DATE 11/19/69 START 151 STOP 157 25% OF TAPE MISSING
TAPE 27 DATE 11/19/69 START 229 STOP ***** 50% OF TAPE BLANK
TAPE 32 DATE 11/26/69 START 204 STOP 210 TAPE SEEMS TO BE TAM?
WITH.
TAPE 33 DATE 12/1/69 START 382 STOP 392 TAPE RUNS OUT, BEFORE
CONVERSATION IS FINISHED
TAPE 39 DATE 12/4/69 START 12/4/69 STOP 132--134 TAPE GOES BLANK
TAPE 45 DATE 12/9/69 START 152 STOP 154 GAP IN TAPE F.S. ON LINE
TAPE 46 DATE 12/12/69 START 301 STOP ***** CONVERSATION MISSING
TAPE 51 DATE 12/19/69 START 346 INTERRUPTING ON LINE
TAPE 52 DATE 12/21/69 START 142 STOP 146 NOT IN SERVICE OPEN LINE
TAPE 52 DATE 12/21/69 START 369 STOP 399 TAPE RUNS OUT CONVER-
SATION IN PROGRESS
TAPE 68 DATE 1/15/70 START 165 STOP 283 OPEN LINE *****
TAPE 76 DATE 1/28/70 START 097 STOP 105 ***** CUT OFF, CONVERSATION
PROGRESS??
TAPE 83 DATE 2/11/70 START 273 STOP 352 PHONE OFF HOOK
TAPE 90 DATE 2/18/70 START 078 CONVERSATION CUT OFF WHILE IN
PROGRESS
TAPE 90 DATE 2/18/70 START 298 STOP 300 CHECK OUT
TAPE 92 DATE 2/19/70 START 355 STOP 397 TAPE RUNS OUT, CONVERSATION
IN PROGRESS
TAPE 98 DATE 2/25/70 START 001 STOP 003, CONVERSATION CUT OFF, ONE
CONVERSATION ON TAPE?

TAPE 101 DATE 2/26/70 START 100 STOP 112 CONVERSATION CUT OFF

GAP OR TAMPERING

TAPE 103 DATE 2/27/70 START 211 STOP 212 Loud Humming on line
TAPE 105 DATE 3/1/70 START 080 STOP 083 --- CROSS CHECK
TAPE 105 DATE 3/1/70 START 243 STOP CONVERSATION IN PROGRESS, NO RING ON TAPE
TAPE 111 DATE 3/6/70 START 398 STOP ** CONVERSATION IN PROGRESS TAPE ENDS
TAPE 112 DATE 3/7/70 START 172 CONVERSATION CUT OFF, 177, 188 192 F.S. ON PHONE
TAPE 125 DATE 3/19/70 START 335 STOP 337 AL DEISC NOTIFIED TELEPHONE CO. PHONE
IS TAPED...
TAPE 132 DATE 3/24/70 START 148 STOP 195 **** CROSS CHECK ****
TAPE 132 DATE 3/24/70 START 310 STOP *** CONVERSATION MISSING AS PER LOG
TAPE 132 DATE 3/24/70 START 371 STOP 395 CONVERSATION IN PROGRESS TAPE RUNS OUT
TAPE 134 DATE 3/25/70 START 144 *** POSSIBLE F.B.I. LEAD. CHECK, TAPE RUNS OUT
TAPE 137 DATE 3/26/70 START ***** NO RING CONVERSATION IN PROGRESS
TAPE 140 DATE 3/28/70 START 100 STOP 125, BENNY'S VOICE IN BACKGROUND ON CONVERSATION

EXHIBIT J

(2)

MARK R. WEISS
3299 Cambridge Ave.
Bronx, N. Y. 10463

20 Rec'd

February 19, 1975

The Honorable Lee P. Gagliardi
United States District Judge
United States Court House
Foley Square
New York, N. Y. 10007

Dear Judge Gagliardi:

I am enclosing a report on the examination I and Ernest Aschkenasy made of tapes and tape recorders in connection with United States vs Frank Sacco and Benjamin Gentile. As you may recall, this examination was intended to determine what, if anything, could be said concerning the authenticity of the tapes after a "quick look" analysis. It is worth noting that this "quick look", which we had estimated would take two days to perform, and for which two days of work will be billed, actually required in excess of 30 hours, or nearly four normal working days. An in depth examination of each tape might well have required at least as much time per tape.

I believe that the examination that was made provides reasonable explanations of the artifacts observed on some of the tapes. On the other hand, reasonable explanations could not be found for other tapes, thereby raising serious questions regarding their authenticity. It is possible that some of the ambiguities can never be resolved, while the resolution of others might require analyses and tests far beyond the ability of the Court and the interested parties to support and beyond my availability to perform. In view of these considerations, I have tried to provide in the report opinions on each tape that were based on my best professional judgement of the available evidence. I would be happy to explain at a Court hearing the tests and test data that form the bases for the opinions that are presented in this report.

Very truly yours,

Mark R. Weiss

Examination of Tape Recordings and Recorders Supplied
by the Westchester County District Attorney's Office

The items supplied for this examination are listed on the attached sheet, which is a copy of a receipt signed by Mark Weiss.

The examination consisted of the following:

1. Test recordings were made on each of the machines to determine their recording characteristics.
2. The machines were opened and examined physically to determine their mechanical operating characteristics and to relate these to their recording characteristics.
3. Each of the evidence tapes was examined for the presence of physical splices in and adjacent to the regions cited in the court record, or throughout the tape if the entire tape was in question.
4. Various sections of each tape were developed to permit visual examination of the characteristics of the recording. These sections included the beginning and end of recording on the tape, the beginning and end of the conversations cited in the court record, and places where clicks and other unusual non-speech sounds were heard.
5. The evidence tapes were played back on a high quality tape recorder/reproducer. The electrical signals that corresponded to the reproduced sounds were analyzed on several different types of electronic analysis instruments. The results of the analyses provided information regarding the continuity of the recording in the analyzed sections (that is, whether conversations may have been spliced in or out). The analyses also provided data that were characteristics of the recorder (or recorders) that were used to record the analyzed sections.
6. The test recordings that were made on the machines that were supplied were developed and analyzed to determine the recording characteristics of those machines and to provide a basis for comparison with corresponding characteristics observed on the evidence tapes.

The results of this limited examination of the evidence tapes and tape recorders are presented below. It is emphasized, and should be clearly understood, that with one exception (Item 5), the results as presented are opinions that are based on the measurement data and on professional judgement. They are not, and should not be construed as being, conclusions.

Examination of Tape Recordings (continued)

Item 1

No signs of alterations were found in the cited conversations on the tapes identified as Plant 2 Tape 1 and Plant 2 Tape 2. The recorder characteristics were found to be distinctly different for each tape, indicating that the conversations were recorded on different machines. Within each tape, the recorder characteristics were found to be the same throughout the tape. Therefore, the cited conversations are not likely to be inserts from some other recordings. Either the entire tape is an original or else the entire tape is a dubbing.

To determine whether a recording is an original or a copy it is necessary to compare the recorder characteristics found on it with those of the machine or machines that might have made it. However, the characteristics we found on these tapes contained no elements in common with those of the machines that were provided for our examination. The characteristics are sufficiently different to lead us to believe that we have not seen the make and model of the machines that recorded these tapes.

Item 2

No evidence was found that the cited section of Plant 1 Tape 87 was altered or tampered with.

Item 3

The 20-minute gap cited for Plant 1 Tape 2 is not blank, as might be supposed from the use of the word gap to describe it, but contains a sound that can be described as a bell-like-buzz. The sound varies somewhat in intensity and occasionally disappears. Occasionally speech sounds and the sounds of a touch-tone dial can be heard under the bell/buzz. The recorder characteristics observed in this section of the tape are the same as those observed at other places before and after this section, indicating that the entire tape was recorded on the same machine.

The characteristics observed at the point at which the bell/buzz begins and at the point at which it finally ends are not consistent with an hypothesis that this sound replaced, through re-recording, conversations that were originally recorded in this section of the tape. A more likely explanation, and one that is consistent with the data, is that the bell/buzz, which consists of harmonics of the power line frequency up to at least 5000 Hz, was the result of a poor connection or a malfunctioning component in the equipment associated with Plant 1 at the time the recording was made.

Examination of Tape Recordings (continued)

It should be noted that a physical splice was found in the section of the tape in which the "gap" occurs. However, based on analyses of the signals recorded in this section of the tape, it is apparent that the splice was made before the tape was recorded on. A second splice, similar to this one, was found much further on in the tape. It too appears to have been made before the tape was recorded. A third splice was found between these. This one was very poorly made, with the splicing tape placed on the wrong side - the oxide side - of the recording tape. Our analyses show that this splice too was made before the recording. However, during the recording, the tape motion slowed and then stopped when this splice began to pass the erase head and the sticky oxide caught on the head. At that moment the tape separated at the splice. When the break in the tape was detected, the tape was respliced at the break, again by securing it on the oxide side. By that time a conversation was in progress. Consequently, when the tape is played, the splice is followed immediately by an ongoing conversation. To insure that the tape would not separate again, it was respliced at the break, on the backing side, by M. Weiss. However, to preserve the original character and appearance of the splice, the splicing tape on the oxide side was left in place.

Item 4

The tape cited under Item 4, designated as Plant 1 Tape 23, is described as being unintelligible throughout. The cause of the unintelligibility is a bell/buzz sound similar to the one observed for Item 3. The intensity of the sound is occasionally reduced when another louder sound occurs, such as the telephone dial tone. Occasionally, it disappears for several seconds. Occasionally voices can be heard under the sound. Near the end of the recording the sound disappears for the remainder of the recording and fully intelligible conversation can be heard.

The recorder characteristics were found to be the same throughout the tape, indicating that the same machine or machines were used to record the entire tape. The presence of speech under the bell/buzz, taken together with the constancy of the recorder characteristic, makes it very likely that the buzz was recorded at the same time as the conversations that it obscures. However, the recorder characteristic that was observed appears to be a composite of the characteristics of two of the types of recorders supplied for our examination: the Sony Model TC-105 and the Buckingham Model B/M 14X. Such a composite characteristic could indicate that the evidence recording is in fact a copy of one that was made originally on a Sony or one that was reproduced on a Sony during the copying process. Alternatively, the observed character-

Examination of Tape Recordings (continued)

istic could indicate that the recording was made on a make and model of recorder that we have not seen, in which case the recording may well be an original. To determine whether this tape recording is an original or a copy would require additional and much more extensive tests and analyses.

Item 5

This tape, identified as Plant 2 Tape 10, is described as being completely blank. We have determined that it is neither a virgin tape nor one that was used, bulk erased, and subsequently unused. Clear signs were found that the tape had been recorded on by two machines, both of them of the Buckingham or Emerson type. The signal that was recorded consists entirely of hum, probably due to either leakage or pickup of 60 Hz from the power line. No other signals, speech-like or otherwise, were heard on the tape.

Item 6

The "skipping" sounds heard on this tape, which is designated as Plant 2 Tape 9, are due to repeated stops and restarts of the recorder during the recording of the conversations on this tape. A similar sound can be heard at the end of each conversation recorded on the tape. When a recording that is being made on the Buckingham or Emerson machines is stopped, as at the end of a conversation, the tape does not come to a halt instantaneously, but slows down over a period of several tenths of a second. During this period the recording of signals, mostly power line hum, continues. As a result, when the tape is played back at a continuous speed the pitch of these signals appears to increase rapidly in frequency as each stopping point is approached. These brief, upward chirps of sound frequency are the skipping sounds that are cited in the court report. The section of the tape that was designated in the report lasts 48 seconds and contains 29 stop/start (i.e., "skipping") sounds. The sounds are fairly uniformly spaced, on the average about 1.7 seconds apart. It is very likely that this section of the recording is the result of erratic operation of the automatic stop/start control of the recorder at the time the recording was being made.

Received this date January 29 , 1975, from Investigator Joseph DiSciorio of the Westchester County District Attorney's Office the following items:

- A. (1) Emerson Reel to Reel Tape Recorder
Model #MM-316
Serial #C15302
- B. (1) Buckingham Reel to Reel Tape Recorder
Model #B/M 14X
Serial #U-05831
- C. (1) Sony Reel to Reel Tape Recorder
Model TC-105
Serial #103785
- D. (7) Seven 7" Reel Tapes of Original Conversations, identified as:
 - A. PLANT 1 Tape 2 dated 10/14/69 - 10/16/69 -
 - B. PLANT 1 Tape 23 dated 11/17/69 - 11/18/69 -
 - C. PLANT 1 Tape 27 dated 2/16/70 - 2/17/70 -
 - D. PLANT 2 Tape 1 dated 10/13/69 - 10/15/69 -
 - E. PLANT 2 Tape 2 dated 10/15/69 - 10/16/69 -
 - F. PLANT 2 Tape 9 dated 10/24/69 - 10/25/69 -
 - G. PLANT 2 Tape 10 dated 10/25/69 - 10/27/69 -
- E. (7) ORIGINAL LOGS PERTAINING TO THE ABOVE-MENTIONED TAPES.

Signature Marl W. [Signature]

Investigator Joseph DiSciorio
Westchester D.A.
914/ 682-2962

EXHIBIT K

K

K

Memorandum ✓
Decision

FILED
U.S. DISTRICT COURT
JUL 28 4 01 AM '75
S.D. N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,	:	
-against-	:	72 Cr. 332
FRANK SACCO, et al.,	:	
Defendant.	:	<u>MEMORANDUM</u>

-----X

GAGLIARDI, D. J.

#12859

Defendant, Frank Sacco, was found guilty in this court, in the United States District Court for the District of Maryland, and in the United States District Court for the Middle District of Florida of violations of the federal extortion laws charged in three separate indictments. Mr. Sacco has moved to set aside these verdicts on the ground that they were allegedly based upon evidence derived from concededly illegal wiretaps of his phones conducted by the Westchester County District Attorney's Office.

Copies of the available tape recordings produced from the Westchester County wiretaps were turned over to Mr. Sacco, and "taint" hearings were commenced in the District of Maryland and in the Middle District of Florida. During the course of these hearings, allegations were made that the tapes had been tampered with, and the parties stipulated that they would be bound by a determination of

MICROFILM

JUL 29 1975

17

this court on the tampering issues. Hearings were then held before this court on the question of whether or not the tapes had been tampered with, altered or otherwise mishandled. By stipulation, an electronics expert was appointed to examine some of the tapes in question; the expert rendered a report and gave testimony.

Having concluded the hearings and having reviewed the applicable law, I now seriously question the possibility of my making a meaningful, independent finding on the tampering issues. I believe that the stipulation, pursuant to which the hearings before me were conducted, was based upon a faulty assumption, namely, that the tampering issues could be effectively severed and determined separately from the ultimate question of taint.

The difficulty essentially stems from the fact that eight of the tape recordings produced from the Westchester County wiretap are concededly missing, and are therefore unavailable to either the court or the defendant. The adversary character of the taint hearings as set forth by the Supreme Court in Alderman v. United States, 394 U.S. 165 (1969), cannot be maintained in some cases without the availability of the tapes, thus mandating suppression. United States v. Huss, 482 F.2d 38 (2d Cir. 1973). However, the Huss case does not state a per se rule, and a resolution of the issues presented by the instant case

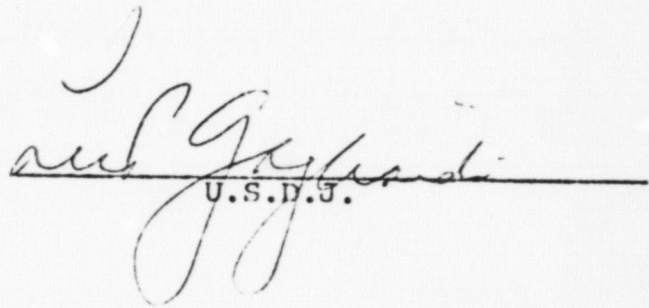
would seem to be goverred, at least in the Second Circuit, by the opinion in United States v. Garcilaso de la Vega, 489 F.2d 761 (2d Cir. 1974). The Court there held that because there was no evidence that missing tapes had been destroyed under suspicious circumstances, and because the government had met its burden by making a strong and creditable showing of an independent, untainted source, the district court properly denied a motion to suppress. The finding of an absence of suspicious circumstances surrounding the loss of the tapes was bolstered by the fact that "the wiretaps were conducted not by the federal government but by the New York City police under a state law that did not require the preservation of [the] tapes." Id. at 764-765.

Although the instant wiretaps were conducted after the effective date of a state law requiring the preservation of the tapes for a period of ten years (N.Y. CRIM. PROC. LAW §700.55 (McKinney 1971)), there is no direct evidence of destruction under suspicious circumstances. In making a determination on the ultimate issue of taint in the Sacco case, the questions concerning the circumstances surrounding the loss of the tapes and those relating to an independent, untainted source would seem to be inseparable. This is because the strength of the proof of an independent source must be weighed against the suspiciousness of the circumstances surrounding the loss of the tapes. Thus, I

do not believe that a meaningful independent determination on the tampering issue can be made.

However, while I question the propriety of doing so, I can at this time state a few tentative, general conclusions reached as a result of the hearings I conducted pursuant to the aforementioned stipulation. At the hearings, Mr. Sacco demonstrated the existence of a number of irregularities on those tape recordings which are still available. However, on the basis of the evidence presented, including the testimony and a written report of the electronics expert, I would conclude that there has been no intentional destruction of or tampering with any of the tapes in question. The irregularities appearing on the tapes were apparently the result of mechanical malfunctions occurring at the time the tapes were originally recorded.

Copies of this Memorandum will be sent to counsel of record.*


U.S.D.J.

Dated: July 28, 1975
New York, New York

*The substance of this Memorandum has been communicated to the Hon. Frank A. Kaufman and the Hon. Noel P. Fox by letters dated June 27, 1975.

EXHIBIT L

(4)

JUL 16 Rec'd

Honorable Frank A. Kaufman
United States District Court
District of Maryland
Baltimore, Maryland 21202

July 9, 1975

Re: United States of America v. Frank Sacco

Dear Judge Kaufman:

While I will not discuss my departure in this correspondence, it will be explained to you in the very near future. I am writing this letter to assure you, Judge Fox and Judge Gagliardi that I hold no animosity nor seek vindictiveness against any witnesses that testified against me.

I am sorry to say that this government of ours is by nature "oppressive" and they seek my blood, not justice. The persons in government have and are still using me as a scape-goat to bolster not only their ego but to remain in whatever power they have by manipulating public opinion against me with a flow of prejudicial information.

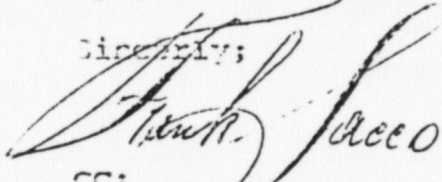
Had the persons in government been forthright and not spent the last two years in covering up their own illegality, I may have stood a chance and a jurist such as yourself would have noted out justice as the constitution and the mandates of the Supreme Court require.

Upon my return, I would respectfully request that this Court exercise its discretionary powers and invoke the inquisitorial method of criminal procedure to determine who was behind the coverup. I am confident that your Honor, as a reasonable jurist, if such an "inquisition" was held would find in the name of justice and not of power.

I realize that I have a debt to pay to society and pay it I will but I do not feel that the life sentence that the government is seeking to have imposed upon me justifies the crime and especially being in the handcuff and bootstrapped position of not being able to defend.

I would advise the Court that it is my intention to continue fighting my present litigations and respectfully request that it rule on all of my previous motions and any future ones that I may file.

Sincerely;



cc:

Judge Fox
Judge Gagliardi
William L. Carrier

Frank Sacco
c/o William W. Carrier
501 St. Paul Place
Baltimore, Maryland 21202



Honorable Lee P. Gagliardi
United States District Court
Southern District Of New York
Foley Square
New York, New York



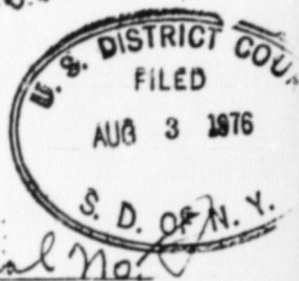
THE METRIC CONVENTION
100TH ANNIVERSARY
1875 -- 1975

EXHIBIT M

M

United States District Court
Southern District of New York

MAP-0.8 Rec'd



United States Of America
v.
Frank Acco, et. al.
Defendant

Criminal No. 71

MOTION FOR REINSTATEMENT
OF POST-TRIAL "TAINT"
HEARING

The defendant Frank Acco, proceeding pro-se respectfully moves the Court to reinstate the "post-trial" taint hearing which was dismissed by this Court upon his failure to appear when the matter was called.

Wherefore, upon the memorandum in support of this motion, it is respectfully requested that the post-trial taint hearing be reinstated and for such and other ^{further} relief that the Court may deem proper and just.

Respectfully submitted,

Frank Acco

Defendant, pro-se

March 3, 1976

Memorandum

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makes this memorandum in support of the herein motion for reinstatement of a post-trial, taint hearing and respectfully shows unto the Court the following:

1. That prior to defendant's departure from Federal custody on June 16, 1975, defendant repeatedly made various motions both oral and in writing to this Court urging for a conclusion of the post-trial taint hearing.
2. That this Court decided it would await the outcome of the post-trial taint hearings being held in the Middle District of Florida and the District of Maryland in that all of the hearings were interrelated.
3. That defendant is unaware of this Court's ruling on a motion made by defendant challenging the integrity of the illegal tapes and various other motions made prior to June 16, 1975.

4. That on March 2, 1976, defendant contacted Mr Howard Jacobs, attorney for co-defendant Gentile at which time Mr Jacobs advised defendant that this Court had dismissed the post-trial taint hearing with respect to defendant but, continued the hearing with respect to Gentile to March 22, 1976.

5. That defendant is back in Federal custody, he is fully familiar with all of the facts pertaining to the post-trial taint hearing, that he believes he has a meritorious defense to prove "taint" that would void his conviction and afford him a new trial, and that it would not be an abuse of discretion to restate the post-trial taint hearing on his behalf.

Defendant respectfully requests oral argument on the attached motion.

March 3, 1976

Respectfully submitted
Frank Racco

EXHIBIT N

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

Plaintiff,

- against -

BENJAMIN GENTILE,

Defendant.

-----X

AFFIDAVIT

72 Cr. 332 (LPG)

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) SS.:

LOUIS E. CHERICO, being duly sworn, deposes and says:

1. I was an Assistant District Attorney for Westchester County for the period December 1, 1969, until March 20, 1975, and in this capacity was involved in the supervision of an investigation of Frank Sacco which had resulted in the court-authorized wiretapping of telephone instrument during the period commencing on September 18, 1969, and continuing from my date of employment until April 6, 1970.

2. I was never personally aware that any information derived from those wiretaps related to any loan or relationship between Frank Sacco, Benjamin Gentile and John Rhines, and an individual named James "Sonny" Robbins, and further, that to my knowledge the name of James "Sonny" Robbins was not identified during the pendency of the wiretaps.

3. I was never told by anyone else that those wiretaps contained information which related to any loan or relationship between Frank Sacco, Benjamin Gentile and John Rhines and an individual named James "Sonny" Robbins until an unknown time after the subject indictment was filed.

4. I therefore have never supplied to any federal law enforcement officials, or to anyone for that matter, any information from any source, including the state wiretaps conducted from September 1969 to April 1970, which related to any loan or relationship between Frank Sacco, Benjamin Gentile and John Rhines and an individual named James "Sonny" Robbins.

Louis E. Chericco
LOUIS E. CHERICO

Sworn and subscribed to

before me this 15th day of March, 1976.

Dorothy Dore
Notary Public

DOROTHY DORE
NOTARY PUBLIC, State of New York
No. 6541200
Qualified in Westchester County
Term Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

FRANK SACCO, et al.,

Defendants.

STATE OF NEW YORK

COUNTY OF WESTCHESTER

} ss.:

ROBERT L. STATON, being duly sworn, deposes and says:

That I am an Investigator on the Staff of the District Attorney of Westchester County, and I have examined certain wiretap Orders and telephone logs connected with the case of the People of the State of New York vs. Frank Sacco. The Court authorized eavesdropping covered a period from approximately September 18, 1969, up to and including a portion of April 6, 1970.

Nowhere in the logs or transcripts of the intercepted telephone communications do the names JAMES BROWN and JAMES ROBBINS appear. In addition, to my knowledge, there was no intercepted communication in which James Brown or James Robbins was a known or identifiable participant.

Sworn to before me this
3rd day of March, 1976.

Thomas J. McCowen

THOMAS J. McCOWEN
NOTARY PUBLIC, State of New York
No. 60-7810375
Qualified in Westchester County
Term Expires March 30, 1976

Robert L. Staton

ROBERT L. STATON
Criminal Investigator

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
UNITED STATES OF AMERICA :
- v - : 72 Cr. 332 (LPG)
BENJAMIN GENTILE, : AFFIDAVIT
Defendant. :
----- x

William H. McKenna, being duly sworn, deposes and
says:

1. I have been an Assistant District Attorney for Westchester County since April 1962, and in this capacity was involved in the investigation of Frank Sacco which resulted in the court authorized wiretapping during the period of September 18, 1969 until April 6, 1970.

2. I have never been personally aware that any information derived from those wiretaps related to any loan or relationship between Frank Sacco, Benjamin Gentile and John Rhines, and an individual named James "Sonny" Robbins.

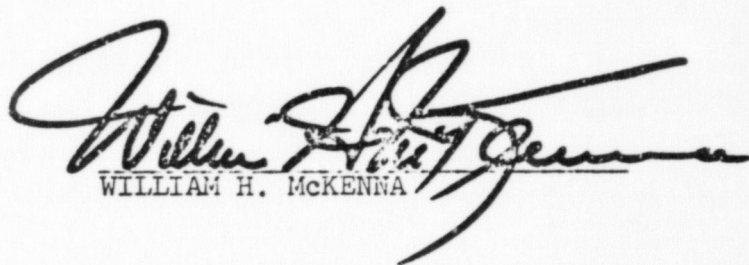
3. I have never been told by anyone else that those wiretaps contained information which related to any loan or relationship between Frank Sacco, Benjamin Gentile and John Rhines and an individual named James "Sonny" Robbins.

4. I never heard of James Robbins or knew who James Robbins was until after Frank Sacco, Benjamin Gentile and John Rhines were convicted in the Southern District of New York in September 1972 on federal extortion charges.

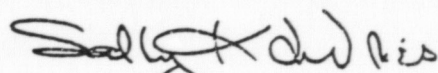
5. I therefore have never supplied to any federal law enforcement officials, or to anyone for that matter, any information from any source, including the state wiretaps conducted from September 1969 to April 1970, which related to any loan or relationship between Frank Sacco, Benjamin Gentile

2.

and John Rhines and an individual named James "Sonny" Robbins.


WILLIAM H. MCKENNA

Sworn and subscribed to
before me this 9th day
of March, 1976



SALLY K. deVRIES
Notary Public, State of New York
No. 60-0940875
Qualified in Westchester County
Term Expires March 30, 1977

EXHIBIT O

0

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,

-against-

FRANK SACCO,

Defendant.

-----x

72 Cr. 332

MEMORANDUM
DECISION

4/5/75

GAGLIARDI, D. J.

0

The defendant Frank Sacco moves to reinstate his post-trial motion to set aside his conviction for violations of the federal extortion laws, 18 U.S.C. §§892, 894 (1976), on the ground that evidence used at his trial was tainted by an illegal wiretap of his phone by Westchester County authorities. The motion was previously denied by this court at a hearing on February 9, 1976 by reason of Sacco's failure to appear. At that time Sacco was a fugitive from federal custody. On February 27, 1976, after approximately eight months as a fugitive, Sacco was apprehended by federal authorities in San Jose, California. Shortly thereafter he filed this motion. The motion is denied.

Sacco was originally convicted of these charges on October 22, 1972 after a two week jury trial. He was also previously convicted of similar charges before federal courts in Baltimore, Maryland, and Orlando,

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Florida. During the course of his trial before this court, Sacco discharged his assigned counsel, Abraham Solomon, Esq. who subsequently at the court's request attended the proceedings acting as Sacco's advisor. After his convictions, Sacco filed voluminous post-trial motions in all courts in which he had been tried alleging that all federal investigations of him were tainted by illegal wiretaps of his phones maintained by the Westchester County District Attorney's office. There were some preliminary proceedings in connection with these claims -- which involve wiretaps continuing over almost a five-year period and some hundreds of reels of tape -- in this court, and there was an extensive hearing on the issue before the court in Orlando as it related to the case there. On June 16, 1975, after most of the evidence had been presented to that court but before the hearing had actually been concluded, Sacco escaped from federal custody. On July 9, 1975, while a fugitive from justice, Sacco wrote a letter to Judge Frank A. Kaufman of the District of Maryland with copies to the other two federal courts before whom he had motions pending stating that his "departure" would be explained to the courts in "the very near future." In that letter, which gave Sacco's Maryland attorney as a return address, Sacco also stated that he wished to advise the courts of his intention to "continue fighting my present litigations", and he requested that the courts rule on "all of my previous

motions and any future ones that I may file." After that letter this court waited several months for Sacco to return to federal custody. On November 10, 1975, with Sacco successfully having eluded federal authorities for almost five months, the attorney in charge of the New York office of the Justice Department's Organized Crime and Racketeering Section wrote to this court requesting that Sacco and his co-defendants be sentenced stating that in the government's view Sacco had waived the opportunity for further hearings on his post-trial motions by becoming a fugitive. The letter went on to state:

As is obvious from its prior actions, the Government is extremely concerned with the three year delay created by Sacco and his frivolous motions. It appears that Frank Sacco has singlehandedly been able to tie this and two other Federal District Courts up in post-trial litigation that not only has proven to be absolutely without merit, but also which has provided him with the opportunity to escape from the federal authorities detaining him prior to sentence. His proliferation of motions designed to stall the sentencing procedure should no longer be allowed to forestall final determination by this Court.

This court then proceeded to schedule a final hearing on the taint motion. Notice was given to Mr. Solomon, Sacco's attorney in the Maryland action, and Howard Jacobs, Esq., the attorney for the defendant Gentile in this action, who joined in the taint motion. After several adjournments for the convenience of counsel, a final date of February 9, 1976 was set. On January 30, 1976, Mr. Jacobs informed this court that the previous

night he had received a phone call from Sacco, who at the time was still a fugitive. Sacco reportedly inquired about the hearing on the taint motion, about which he had apparently had some previous notice. Mr. Jacobs informed Sacco of the February 9, 1976 hearing date. On the evening of February 8, 1976, Sacco again called Mr. Jacobs to ask what would happen at the hearing the next day. Sacco failed to appear at the hearing, and Mr. Solomon indicated to the court that he was in no position to proceed as his client had conducted all post-trial proceedings and had taken all relevant records with him when he escaped from federal custody. As it was clear that Sacco had actual notice of the hearing and that he knew that under the circumstances his presence was indispensable to the proceedings, his post-trial motions were denied on the record in open court by reason of his failure to appear. A hearing on his co-defendant's motion was put over to a later date.

Having been apprehended two and a half weeks later by federal authorities, Sacco now asks that this court reinstate his motions. The request is denied. It is well established that a defendant's appeal of his conviction may be unconditionally dismissed by reason of the defendant's being a fugitive from justice. Molinaro v. New Jersey, 396 U.S. 365 (1970); United States v. Sperling, 506 F.2d 1323, 1345 (2d Cir. 1974); Brinlee v. United States, 483 F.2d 925 (8th Cir. 1973); United States v. Shelton, 482

F.2d 848 (5th Cir. 1972); Hitchcock v. Laird, 456 F.2d 1064 (4th Cir. 1972); United States v. O'Neal, 453 F.2d 344 (10th Cir. 1972); Johnson v. Laird, 432 F.2d 77 (9th Cir. 1970). The theory of these cases is that the defendant who has escaped the restraints put on him pursuant to the conviction should be "disentitled to call upon the resources of the court for determination of his claim." Molinaro, supra at 376. While most of these cases dealt with appeals of conviction or writs of certiorari to the Supreme Court, the reasoning therein is fully applicable to post-conviction motions filed in the district court. Cf. United States v. U.S. Commanding Officer of the Office of the Provost Marshal, U.S. Army, 496 F.2d 324 (1st Cir. 1974). In this case Sacco was convicted after a trial by jury. Although he has filed motions to set aside that conviction on the ground that evidence used at trial was illegally obtained, unless and until those motions are granted, there is no reason why Sacco should be in any different position with respect to his rights after an escape from custody from a defendant whose conviction is on appeal. Similarly the Molinaro case clearly holds that a court may dismiss an appeal immediately without awaiting the expiration of any fixed period of time after having learned that a defendant is a fugitive from justice.

While this court may, as Sacco suggests, have the discretionary power to reinstate his motions now that he has been captured by the federal authorities, under the circumstances of this case, this court does not believe that that power should be exercised. Sacco was convicted of these charges almost four years ago. Although numerous post-trial proceedings have already been held in this court on these motions, Sacco has yet to demonstrate that the wire-taps of the state authorities in any way tainted his conviction here. Furthermore, Sacco, by his escape, has flagrantly indicated that he has no further interest in pressing these claims. He has thus conceded the lack of merit of his motions and has contemptuously sought to evade all lawful authority. Nowhere do his motion papers in any way attempt to explain his seven month "departure" from lawful authority. Although this court must seriously consider all allegations that a conviction in a trial before it has been tainted by illegal evidence, it does not believe that it is required to play a cat and mouse game with a defendant who flagrantly abuses the processes of the court and clearly has no interest in appearing before the court to pursue his claims in accordance with lawful procedures.

The determination herein is fully supported by the Fifth Circuit's recent decision in United States v. Shelton, 508 F.2d 797 (5th Cir. 1975), where, on facts remarkably similar to those here, the court refused to rein-

state the appeal of a defendant who had been apprehended after his appeal was dismissed because of his earlier escape from custody. The Court there stated:

If a court retains any discretion after Molinaro, the facts and circumstances which we have set out make clear that such discretion should not be exercised here. Shelton flagrantly abused the processes of this court and of the district court. . . . The situation is similar to that in which a petitioner's appeal is conditionally dismissed subject to reinstatement if within a reasonable time he makes it known to the court that he is available and subject to any judgment which might be entered, and petitioner fails to do so, suffers a dismissal, and then later seeks reinstatement with no explanation for his conduct.

The motion to reinstate is denied.
508 F.2d at 799

The Supreme Court recently upheld the constitutionality of a Texas statute requiring dismissal if an escaped defendant does not voluntarily return to custody within 10 days. Estelle v. Dorrough, 420 U.S. 534 (1975). The Court there specifically stated that there is no requirement that an appeal dismissed pursuant to the principles of the Molinaro case be reinstated after the defendant has returned to custody. 420 U.S. at 537; Allen v. Georgia, 166 U.S. 138 (1897).

The defendant's request to reinstate his motions and to set aside the jury verdict is thus denied.

So Ordered.

Dated: New York, New York
June 3, 1976.

STATE J. BAGLINI
U.S.D.J.

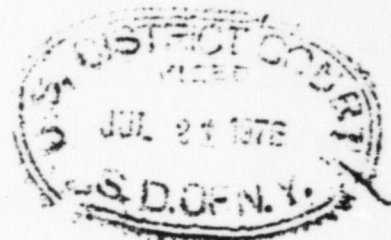
A TRUE COPY
RAYMOLD F. [unclear]

By [Signature]
Deputy Clerk

EXHIBIT P

P

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- -x
UNITED STATES OF AMERICA,

-against-

BENJAMIN GENTILE,

Defendant.

:
: 72 Cr. 332
: 72-1104
: MEMORANDUM
: DECISION
: 44813
----- -x

GAGLIARDI, D. J.

Defendant, Benjamin Gentile, moves to have his conviction for violations of the federal extortion laws, 18 U.S.C. §891, 892 (Supp. 1976), set aside on the ground that evidence used against him at trial was the result of illegal wiretapping. Gentile was found guilty in this court after a trial by jury of conspiring with co-defendants Frank Sacco and John Rhines to collect loans made to James Robbins by using threats of violence. It is now undisputed that between September 15, 1969 and April 6, 1970, the Westchester County District Attorney's Office maintained a wiretap on Sacco's phone, which for the purposes of this motion is conceded to be illegal. Gentile claims that the government used information obtained from this illegal wiretap in the prosecution of its case against him and that thus his conviction must be set aside. This court does not agree.

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Even assuming that Gentile has standing to challenge the use of information obtained from these wiretaps, his motion must be denied as this court finds that that information was not used by federal authorities in connection with the prosecution of this case. William Walsh, the F.B.I. agent in charge of the investigation of the Robbins loan, testified at a post-trial hearing in this case, as well as at similar hearings in other loan sharking cases involving Sacco in Baltimore and Orlando, that at no time did he use in connection with his investigation any information obtained by state authorities from wiretaps of Sacco's phone. He also testified that at no time in the course of his investigation did he exchange information of any consequence relating to this case with Westchester County officials, nor was he even aware of the existence of the Westchester County wiretaps until several months after they had been removed. In fact, in testimony which this court finds fully credible, Walsh stated that because of uncertainty as to the legality of these wiretaps, he attempted specifically to avoid any information that might have been uncovered as a result of them. While there is some testimony by former New York State police officials at other hearings, which by stipulation is part of the record here, that information from the wiretaps was passed to federal authorities, the credibility of these officials was significantly impeached, and

that testimony is contradicted by the sworn statements of other state and federal authorities.

Gentile contends that since Walsh admits that he received certain information in connection with this investigation from the New York State Liquor Authority ("S.L.A."), it can be inferred that he obtained information from the illegal wiretaps even though Walsh himself may have been unaware of the source of that information. At the hearing before this court no evidence was presented to indicate that any information in the S.L.A. files came from the illegal wiretaps. More importantly, the government showed that the information available to the F.B.I. from the S.L.A. reports had been previously obtained from other independent investigative sources of the F.B.I. For example, Agent Walsh testified that information about the opening of Dooley's Bar which Gentile claims was the fruit of the illegal wiretaps, came from federal agents operating in the area. Similarly, information about a \$500 check from Robbins to one of Sacco's associates came originally from Robbins and only later from the S.L.A.

Under these circumstances, this court believes that the government has sustained its burden of showing that the information it received in connection with this case came from untainted sources. Alderman v. United States, 394 U.S. 165, 183 (1969); Nardone v. United States, 308 U.S. 338, 341 (1939). Defendant's motion to set aside conviction is thus denied.

So Ordered.

S/LEE P. GABLIARDI
U.S.D.J.

Dated: New York, New York
July 21, 1976.

A TRUE COPY
RAYMOND F. BURGHARDT, CLERK
BY S. J. G. [Signature]
Deputy Clerk

EXHIBIT Q

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

vs.

FRANK SACCO

)
)
)
)
)

No. 71-0371 Criminal

Baltimore, Maryland

May 28, 1976

The above-entitled case came on for imposition of sentence before, The Honorable Frank A. Kaufman at 11:28 o'clock a.m.

A P P E A R A N C E S

For the Government:

Paul R. Kramer

For the Defendant:

William W. Carrier

EXCERPT FROM TRANSCRIPT OF PROCEEDINGS

THE COURT: Good morning, gentlemen.

We will go forward now in United States v. Sacco, Criminal Number 71-0371-K.

In this case, I filed a Memorandum and Order on May 12, 1976 in which I stated that after a careful review of all documents and communications submitted to that time by the Government and Mr. Carrier and Mr. Sacco, and after reading all the pages in the proceedings before Judge Fox that took place in the Middle District of Florida which had been designated by the Government and the defendant, and that means by Mr. Sacco pro se as well as by Mr. Carrier, I determined not to further reconsider this Court's Memoranda and Orders filed on July 30, 1975 and September 30, 1975.

I furthermore stated in the Memorandum and Order of May 12, 1976 that this Court has found no evidence that the Government in this case utilized any evidence gathered directly or indirectly as a result of the Westchester wiretapping.

I have an opinion as to what the standard is with regard to burden of proof under these circumstances, but if I were proceeding on a basis where the Government had the burden of proof beyond a reasonable doubt, I would find and do find beyond a reasonable doubt that there is no evidence that the Government utilized directly or indirectly the fruits of the wiretapping, assuming arguendo at the moment that the wiretapping

was unconstitutional.

I have in mind Judge Gagliardi's frank and candid statement which indicates that he was troubled with regard to the missing tapes. I am troubled. I wish they were available, but they are not available and I have seen no evidence, direct or indirect, that the Federal Government has anything to do with their not being available, nor have I seen any evidence to indicate to this Court, other than inferences which can perhaps be suggested, that there was any purposeful destruction of those tapes.

Certainly I find no reason to believe that any federal official or any other official, state, county or other, or any person in the world destroyed or tampered with or altered any of the missing tapes or any other tapes in order to make them unavailable in connection with this case, or in connection with any other case in which the defendant has been convicted, but certainly not in connection with this case.

I make the point of other cases, Mr. Carrier and Mr. Kramer and Mr. Sacco, because if there are any other prior convictions which could perhaps be considered tainted, I will hear whether I should take them into account in connection with sentencing today.

In this case, however -- and I now return solely to consideration of this case -- I want to reiterate what I said

in the Memorandum and Order which I filed on May 12, 1976. I find that the Government and, as I have said, I find beyond a reasonable doubt that the Federal Government, the federal officials involved, took every step to insulate themselves from learning anything of the Westchester County wiretapping because they were afraid as soon as they had any knowledge that it was taking place, "they" being the federal officials, that it perhaps had either not been properly authorized to begin with or that it had not been sufficiently curtailed and minimized as required by the Constitution and/or any law or laws.

Mr. Sacco was given the opportunity not only to have extensive hearings in this court, which proceedings were not completed before he escaped from custody in Florida, but he was also given the opportunity during the period he was confined at Lewisburg to go over all of the tapes, to listen to them and to have equipment and to have an opportunity to study them.

In addition, though these proceedings I am now going to refer to were not conducted in this court, he had extensive proceedings before Judge Fox in Florida, as well as proceedings before Judge Gagliardi in the Southern District of New York, and he had an opportunity, represented by counsel, in those proceedings in those courts, those two courts, as well as in the posttrial proceeding in this court during which he was

represented by counsel, to go forward to establish or to bring to this Court's attention any evidence that he wanted to.

If I proceed, arguendo only, and I am not stating that I believe this is the proper standard or the proper approach, but if I assume that the burden under these circumstances was entirely on the Government, I think the Government has met it, and I find nothing except conclusory allegations to the contrary, plus inferences which Mr. Sacco and his various counsel in this court and other courts have asked this Court to draw.

I can understand that eyebrows might be raised and questions might be asked when extensive wiretapping of the kind that took place in Westchester County by the local officials there took place.

But I heard testimony in this court, I have read everything I have been asked to read in every document that has been filed, including the transcripts of the posttrial proceedings before Judge Fox, and the findings that I make today and made at one or more prior dates and made again on May 12, 1976 are based on what I have just said and upon my complete and full review, after many, many hours of reading and consideration of the problems in this case.

I see no reason to believe that anything that is missing, that is, any missing portions of the tapes or altered portions of the tapes, would show anything different.

Unless, therefore, there is a per se rule which says that if governmental officials who are not federal officials have lost a part of the wiretapping record, that means there is an automatic assumption that the evidence used by the federal officials is tainted, then I see no cause or no reason to grant the posttrial motion of the defendant and to order a new trial or to take any other action to relieve the defendant from the judgment of conviction in this case.

Accordingly, even if the defendant had not escaped from custody, I believe that I would approach the case as I have just indicated.

When I take into account the fact that the defendant escaped from custody and made himself unavailable for the proceedings to continue as scheduled in this court, and when I look at the law which I have cited in previous documents and Memoranda and Orders filed in this case, I conclude that it would not be in the interests of justice for this Court to reopen or to reconsider the judgment of conviction which it entered at a time while the defendant was out of custody and after giving the defendant an opportunity for some months to appear and to continue to take part and to make himself available for the posttrial taint hearings and the continuation of them.

Accordingly, the judgment of conviction stands in this case and I confirm and affirm and reaffirm at this time

the Order of May 12, 1976 entered in this case.

At that time, I stated that the sentencing would take place on Friday, May 28, 1976 at 11 a.m. Except for the fact that we started a few minutes after 11 a.m., this proceeding is taking place at this time.

Now, a presentence report in this case, dated April 2, 1976, prepared by Anthony DeCerbo, a probation officer of this court, has been submitted to the Court.

I did not look at that report until after I filed my Order on May 12, 1976. I have looked at it since that date.

Mr. Kramer, have you seen it?

MR. KRAMER: Yes, sir, I have.

* * * *

EXHIBIT R

R

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CR. NO. 72-332

Locket No. 76-1373

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

FRANK SACCO, et, al,

Defendant-Appellant

Honorable Lee P. Gagliardi:

MOTION FOR REMAND FROM THE
SECOND CIRCUIT COURT OF
APPEALS FOR A FULL AND
COMPLETE TAINT HEARING

Frank Sacco
Defendant-Appellant
Pro Se
Box P.M.B
Atlanta, Ga. 30315

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,
Plaintiff/Appellee,

versus

FRANK SACCO,
Defendant/Appellant

CR. No. 72-332

Docket No. 76-1373

-----X
NOTICE OF MOTION

To: United States Attorney
For the Southern District of New York
Foley Square, New York, New York

SIRS;

P L E A S E T A K E N O T I C E , that upon the annexed motion, the affidavit, the memorandum of law, the records and files, of the proceedings heretofore had herein, and in the interest of justice, the defendant/appellant Frank Sacco, proceeding pro se, will move this Court for a hearing on the attached motion for Remand of the above captioned case from the United States Court of Appeals for the Second Circuit for a full and complete "taint" hearing as mandated by the Supreme Court in ALDERMAN v UNITED STATES, 394 U. S. 165.

F U R T H E R that the Court ORDER the Government to produce the defendant/appellant for the hearing on the 22nd day of October, 1976, at a designated Courtroom in the United States Courthouse for the Southern District of New York or as soon thereafter that the Court may determine consistent with Due process of law.

October , 1976
United States Penitentiary
Box P.M.B.-95551
Atlanta, Georgia 30315

Yours etc.,

Frank Sacco
Frank Sacco, defendant/appellant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,
Plaintiff/Appellee,

CR. No. 72-332

Docket No. 76-1373

versus

FRANK SACCO,
Defendant/Appellant

MOTION FOR REMAND
FROM THE SECOND
CIRCUIT COURT OF
APPEALS FOR A FULL
AND COMPLETE "TAINT"
HEARING

-----X
COMES NOW the defendant/appellant, Frank Sacco, in his own proper person, and respectfully moves the Court for an ORDER remanding the above entitled cause of action pending before the United States Court of Appeals for the Second Circuit, for a full and complete "taint" hearing as mandated by the Supreme Court holding of ALDERMAN v UNITED STATES, 394 U.S. 165.

This Court has jurisdiction to entertain this motion pursuant to Rule #8, Federal Rules of Appellate Procedure, holding that such applications as herein requested must first be presented to the District Court.

In support of this motion, the defendant/appellant, in good faith, and any delay in presenting this motion cannot be termed dilatory, nor is the defendant abusing his motion rights, seeking to delay the appeal without just cause.

That the record on appeal, and the personal knowledge of this Court of the pleadings pertaining to the issue of "taint" will demonstrate that

the Court abused its discretion and exhibited arbitrary prejudice by failing to afford defendant/appellant a full and complete evidentiary "taint" hearing as more fully described in the annexed affidavit.

WHEREFORE, the defendant/appellant having shown just cause in the moving papers attached hereto respectfully prays the Court grant this motion, thereby ORDERING the case remanded for a full and complete "taint" hearing to determine if any of the evidence was "tainted" by illegal wiretapping which was introduced against him at trial and for such other and further relief that the Court may deem proper and just.

Respectfully submitted,

Frank Sacco

Frank Sacco, Defendant/Appellant

Sworn To And Subscribed Before -
Me This 7 Day Of October, 1976

Charles C. Miller
Parole Officer

Parole Officer: Authorized by the Board of
July 7, 1955 to Administer: 4004E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA

Plaintiff/Appellee,

CR. No. 72-332

Docket No. 76-1373

versus

FRANK SACCO,

Defendant/Appellant

A F F I D A V I T

-----X

STATE OF GEORGIA)
COUNTY OF FULTON) ss

FRANK SACCO, being duly sworn, deposes

and says:

1. That he is the defendant/appellant herein and makes this affidavit in support of the attached motion for remand from the Second Circuit Court of Appeals for a full and complete "taint" hearing to determine if "tainted" evidence was introduced against him at trial which derived from illegal wiretaps.

2. Prior to trial in the instant matter, I filed pro se motions for Discovery and Inspection to ascertain whether or not electronic surveillance or eavesdropping was used in the gathering of evidence that was to be used against me at trial and the government responded that there was none.

3. On September 13th, 1972, when the trial commenced, I again raised a pre-trial motion to determine whether certain gathered evidence by the government could or should be suppressed because of illegal wiretapping that became known to me in another related case.

4.

The Court responded to my motion by stating: Tr. p. 25;

"In the event that they should obtain a conviction here, the conviction would be completely invalid if there were any leads gained, if the representation of the government were erroneousunder those circumstances I am accepting the representation of the government".

DEFENDANT SACCO: "Why go through a whole trial your honor? "

THE COURT: "I am required I am not required but I am accepting the representation of the United States Attorney, and that is the same as an affidavit, sworn testimony of Mr Broderick that no such representation is made and he is presumed to be knowledgeable of what is in his files".

5.

The Courts assumption that the Governments representation was impeccable certainly cannot be considered the same as an affidavit and sworn testimony especially when I challenged the evidence that was to be used against me in light of admitted illegal wiretapping that was exposed in a similar outstanding case in the District of Maryland. Indeed, in a memorandum decision handed down on July 21st, 1976, the Honorable Lee P. Gagliardi conceded that wiretaps were conducted against me thus showing the governments representation was erroneously given.

6.

Having been denied the pre-trial hearing to determine if any leads or evidence was obtained as the result of the illegal wiretaps, my trial commenced and I was found guilty on September 26, 1972, at which time I renewed my motion for an evidentiary hearing pertaining to the wiretaps which was denied.

7.

That on October 11th and the 20th, 1972, I filed motions for a stay of the sentence and for an evidentiary hearing pertaining to the illegal wiretaps. The motions were denied.

8. After having been denied the motions for a stay of sentence and the evidentiary hearing pertaining to the illegal wiretaps, I filed a petition for a writ of mandamus in the United States Court of Appeals for the Second Circuit requesting the same relief and prior to the Court acting on said motions, the District Court granted me the relief sua sponte.

9. Having been granted the post-trial "taint" hearing, I filed voluminous motions to conduct and conclude the hearing but to no avail. The Court's reason for not conducting the hearing was that it wanted to wait until post-trial "taint" hearings pending in the District of Maryland and the Middle District of Florida were concluded.

10. One of the major delays in conducting the post-trial "taint" hearings was due to the fact that New York State officials who conducted the electronic surveillance refused to turn over the tapes and logs their reason being that future prosecutions would be hampered and possible witnesses might be put in jeopardy.

11. After approximately 13 months of legal arguments in the United States District Court for the District of Maryland and the government under the threat of losing 3 major cases convinced the New York State Authorities to turn over the illegal tapes and logs. After receiving the tapes and logs, it took me approximately another 9 months to listen to the tapes and review the logs.

12. While reviewing the logs and listening to the tapes, it came to my attention that the tapes may have been tampered with and I immediately made motion to the Court for an expert to examine the tapes.

13. The motion for the expert to examine the tapes was granted and it was stipulated between myself and the Courts for the District of Maryland and the Middle District of Florida that the Hearing would take place before Judge Gagliardi and that I would be bound by his findings in the other Courts.

14. After lengthy delays, the tampering hearing was conducted and on July 28, 1975, a memorandum was handed down by the Court wherein the Court stated:

"Having concluded the hearings and having reviewed the applicable law, I now seriously question the possibility of making a meaningful, independent finding on the tampering issues. I believe that the stipulation, pursuant to which the hearings before me were conducted, was based upon a faulty assumption, namely, that the tampering issues could be effectively severed and determined separately from the ultimate question of taint.

15. The question of missing tapes and the tampering of the balance of tapes not examined by the expert has never been resolved and the Court in its memorandum of July 28, 1975, stated that the adversary character of the taint hearing as set forth in ALDERMAN v UNITED STATES, 394 U.S. 165, cannot be maintained in some cases without the availability of the tapes, thus mandating suppression.

16. That on June 16, 1976, I departed from custody and was declared a fugitive from justice. On February 9th, 1976, this Court denied my post-trial motions on the record without any conditions for reinstatement. The post-trial "taint" hearing with respect to my co-defendant was put over to a later date.

17. On February 28th, 1976, I was apprehended by Federal authorities and shortly thereafter moved the Court to conclude the post-trial "taint" hearing.

18. By a memorandum decision dated June 3rd, 1976, the Court denied my motion for reinstatement of the post-trial "taint" hearing by relying on MOLINARO v NEW JERSEY, 396 U.S. 365 (1970), which held; "it is well established that a defendants appeal of his conviction may be unconditionally dismissed by reason of the defendant being a fugitive from justice." Relying on the Molinaro decision, this Court held that there is no reason why I should be in any different position with respects to my rights after my escape from custody from a defendant whose conviction is on appeal. If the Court of Appeals holds this ruling to be so, then it would mean that I lost my right to the direct appeal which is being perfected by appointed counsel to be ready and heard during the week of January 3rd, 1977.

19. After denying my motions for reinstatement of the post-trial "taint" hearing, the Court proceeded with the post-trial hearing with respect to my co-defendant, Benjamin Gentile and on July 21st, 1976, rendered a decision against him based upon a partial hearing of several witnesses and some stipulated testimony from transcripts of the post-trial taint hearing held in the Middle District of Florida, Tampa, Florida.

20. I respectfully submit to the Court that if the hearing was afforded to me that I would have impeached the credibility of F.B.I. Agent Walsh and sustained my burden that the information the government received in connection with this case came from "tainted" sources.

21. I further submit that neither my co-defendant Gentile or his appointed counsel ever listened to the tapes or reviewed the logs and were unfamiliar with the facts or witnesses that could have proven the "taint".

22. That in the post-trial "taint" hearing held on behalf of my co-defendant Gentile, F.B.I. Agent Walsh while testifying was successful in prejudicing this Court against/in that he led the Court to believe that he had been intimidated and also that there was impropriety either on behalf of the Court in the Middle District of Florida or my attorney by the turning over to me documents that were authorized by the Court. See transcript Dated March 30th, 1976.

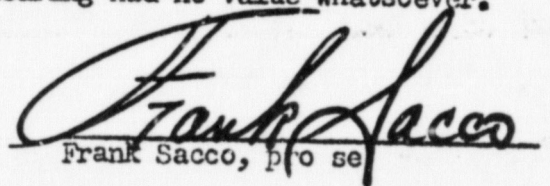
23. That under the penalty of perjury, I solemnly swear that prior to my departure from custody and during the period of time that I remained at large that I never intimidated Agent Walsh much less think about it and with respect to the documents that he led the Court believe that I received by impropriety, I state that I received these documents from Mr Leon J. Greenspan, my Court appointed attorney who received them by direction of the Court in the Middle District of Florida, Tampa, Florida. What Mr Walsh tried to do while on the stand was to throw up a smoke screen and get away from the issue of "taint". The transcript speaks for itself.

24. In conclusion, I submit to the Court that in the post-trial "taint" hearing conducted before the Honorable Noel P. Fox in the Middle District of Florida, judge Fox precluded my attorney from going into the issues of "taint" pertaining to this case and my outstanding case in the District of Maryland, therefore the transcripts of those proceedings that were stipulated to by Gentile's counsel in his hearing had no value whatsoever.

SWORN TO BEFORE ME THIS
1 day of October, 1976

NOTARY

People Officer Authorized by the Fed of
July 7, 1955 to Administer Oath (18 U.S.C.
4804).


Frank Sacco, p/o se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA

CR. NO. 72-332

versus

c/a Docket No. 76-1373

FRANK SACCO, et, al,

Defendant/ Appellant

-----X

MEMORANDUM IN SUPPORT OF ATTACHED MOTION

In the case at bar, and prior to trial, defendant/appellant, alleged that New York State Authorities conducted illegal electronic surveillance over his phones and turned over information obtained from them to the Federal government who utilized it in obtaining the indictment and conviction against him.

The first prerequisite when it is alleged that evidence is the product of exploitation of primarily illegality or exploitation of unlawful wiretapping is that the opponent of the claim shall first affirm or deny the occurrence of the alleged unlawful act. See Title 18, U.S. Code § 3504.

In the instant matter, the Court took the Assistant United States Attorney's representation that there was no leads or evidence obtained from wiretaps and denied defendant/appellant's motion for an evidentiary hearing to determine if any evidence should be suppressed.

As it was proven later, the government was aware of the unlawful act of the New York State Officials by receiving information from them which came from the wiretaps.

As the records and annexed affidavit indicate, a post-trial "taint" was granted and later dismissed because of defendant/appellant's fugitivity. However, the Court conducted the post-trial "taint" hearing on behalf of defendant/appellant's co-defendant Gentile. It is defendant/appellant's contention that the District Court abused its discretion in not giving him a full and complete hearing as mandated in ALDERMAN v UNITED STATES, 394 U.S. 165 ,.

The ALDERMAN case is not an easy case to avoid or evade. In essence, it comes down to the preservation of the adversary character of criminal prosecution under our Anglo-American system of justice. What it holds is that not even a Federal Judge whose powers are for most matters put on par with Diety can decide whether evidence is material or relevant or useful to the defense. "Only the defense can do that".

The language of ALDERMAN also mandates that a hearing be held and that a defendant has the right to see the records of unconstitutionally evidence obtained and thereafter to cross-examine government witnesses and to introduce evidence on his own behalf before the Court attaches credibility to the testimony of the government's witnesses concerning the lack of taint, no matter how strong or how credible that testimony may initially appear before the defendant sees those records. This was not afforded defendant/appellant in the instant matter which is not only contrary to ALDERMAN, supra, but also to the holding of Nardone v United States, 308 U.S. 338 (1969).

Turning to defendant/appellant's fugitivity, the reason giving by the Court for terminating the post-trial "taint" hearing that was afforded him, it is submitted that the cases submitted by the Court to support the dismissal of the hearing are not analogous to the instant matter and in light

of UNITED STATES v DOYLE RAY HENDERSON, CR. No. 74-4024, Fifth Circuit; UNITED STATES v RAP BROWN, 456 F 2d. 1112, (Fifth Circuit 1968); and United States v Miller, No. 74-4047 (Fifth Circuit) the post-trial "taint" hearing should have been reinstated. Indeed, the above cases were after conviction and their appeals pending. In the instant case, there never was a judgment of conviction, sentence or a notice of appeal pending thus putting defendant/appellant in a different posture than a defendant who became a fugitive while his appeal was pending.

Equal protection and due process is involved in the instant matter and it is defendant/appellant's contention that the Court should have afforded him the procedural rights that the Court of Appeals afforded in BROWN, supra, and McKINNEY v UNITED STATES, 403 F 2d. 57 (5th Cir.) 1968,

Even going as far as the direct appeal itself, there is no dispute that an appeal from judgment of conviction rendered by a Federal District Court is a matter of right. COPPEDGE v UNITED STATES, 369 U.S., 438 (1962); BREWEN v UNITED STATES, 375 F.2d. 285, (5th Cir. 1967)

This Court in the instant matter has relied upon MOLINARO v NEW JERSEY, 396 U.S. 365, which created a "discretionary" power in the Appellate Courts in the area of fugitive status during appeals. The Court in MOLINARO, said nothing, that prevents reinstatement of an appeal under the proper circumstances. To the contrary, the Supreme Court said that an "escape does not strip the case of its character as an adjudicable case or controversy". 396 U.S. atp 366.

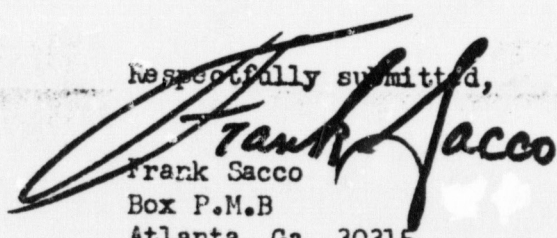
The Court in dismissing defendant/appellant's post-trial "taint" hearing had not imposed any conditions for reinstatement as was done in JOHNSON v LAIRD, 432 F.2d. 77 (9th Cir. 1970) which is a case that shows conditional dismissal is not always a fruitless gesture. The Court knew that defendant/appellant was in contact with his co-defendant's attorney that and could have easily relayed the Court's order of conditions/it could have found appropriate for conditional dismissal but didn't do it. It is unfortunate that this did not happen because defendant/appellant had given some indication of his willingness to return.

Since defendant/appellant's fugitivity did not strip his case of its character as an adjudicable case or controversy, the issues that would be raised on direct appeal could be made a basis for a collateral attack under 28 U.S.C. § 2255. Such an eventuality was expressly recognized by the Supreme Court in the post-MOLINARO case of GACA v UNITED States, 411 U.S. 618 (1972), where the Court ordered an appeal reinstated in the Court of Appeals for the Third Circuit, where the government did not oppose same.

With respect to possible injustice, it should be noted that defendant/appellant's post-trial "taint" hearing was not based on a frivolous representation but on violations of his constitutional rights under the Fourth Amendment and had he been afforded a full and complete hearing, he would have proven that the conviction obtained against him was the result of "tainted" evidence. In furtherance of justice, the attached motion should be granted.

Dated:
October 7th, 1976

Respectfully submitted,


Frank Sacco
Box P.M.B
Atlanta, Ga. 30315

CERTIFICATE OF SERVICE

The defendant/appellant Frank Sacco, proceeding pro se, hereby CERTIFIES that he mailed the original of the attached moving documents to the Honorable Lee P. Gagliardi, United States District Court, Southern District of New York, Foley Square, New York, New York, a true copy to Michael C. Eberhardt, Special Attorney, United States Department of Justice, 26 Federal Plaza, New York, New York, and a true copy to the Clerk of the Court for the Court of Appeals for the Second Circuit, United States Courthouse, Southern District of New York, Foley Square, New York, New York, on the date indicated below .

Dated:

October 7th, 1976

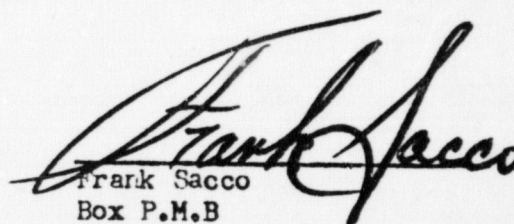

Frank Sacco
Box P.M.B
Atlanta, Ga. 30315

EXHIBIT S

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -x
UNITED STATES OF AMERICA, :
 : 72 Cr. 332
-against- :
 : MEMORANDUM
FRANK SACCO, : DECISION
 :
Defendant. :
----- -x
GAGLIARDI, D.J.

Defendant Frank Sacco moves for an order remanding this case now pending before the United States Court of Appeals for the Second Circuit "for a full and complete 'taint' hearing." Upon the filing of the notice of appeal, the District Court no longer had jurisdiction to pass upon the present application and the motion is therefore denied. Rule 8 Fed. R. App. P., cited by the defendant, only applies to stays and is not applicable.

Even if this court did have jurisdiction, the motion would be denied for the reasons stated in the court's memorandum decision of June 3, 1976 denying the same motion for a "taint hearing."

So Ordered.

W. Lee P. Gagliardi
U.S.D.J.

Dated: New York, New York
November 23, 1976.

Received one copy of Supplemental
Appendix of Frank Sacco on
Jan. 19, 1977.

Robert B. Fiske, Jr.
U.S. Atty

By: Michael C. Eberhardt
Special Attorney
U.S. Dept of Justice